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No. 06-480

In The
Supreme Court of the United States

LEEGIN CREATIVE LEATHER PRODUCTS, INC.,

Petitioner,

v.

PSKS, INC., doing business as
KAY'S KLOSET . . . KAY'S SHOES,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

BRIEF OF BURLINGTON COAT FACTORY WAREHOUSE CORPORATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF BURLINGTON COAT FACTORY WAREHOUSE CORPORATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

Burlington Coat Factory Warehouse Corporation ("Burlington Coat Factory") operates a nationwide chain of "off price" retail stores that offer consumers designer and brand-name clothing, shoes, and household merchandise at prices substantially lower than large department stores, its principal competitors. Like many other discount retailers, it has long relied on the legally mandated absence of price-fixing agreements in the vertical chain of product distribution.

Some twenty years ago, Burlington Coat Factory filed a brief as an *amicus curiae* in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), urging the Court to decline the Justice Department's invitation to overrule *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). Burlington Coat Factory again appears before the Court as an *amicus curiae* to urge the Court not to overrule that nearly century-old precedent for the same reason it did in *Monsanto*: The elimination of the per se rule against vertical price-fixing will likely subject it, along with many other discount retailers, to the harmful effects of manufacturer- and distributor-imposed minimum price requirements.[1]

[1] Burlington Coat Factory affirms that no party's counsel wrote this brief (in whole or in part) and that no person other than it and its counsel contributed monetarily to this brief's preparation or submission. The parties' letters consenting to the filing of this brief have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

The issue in this case is not whether, as an original matter, modern economic analysis justifies the per se treatment of vertical price-fixing. The issue is whether the Court should now overturn the per se rule governing vertical price-fixing adopted nearly a century ago in *Dr. Miles*, maintained in the Court's decisions ever since, and, in recent decades, strongly endorsed by Congress. We submit that none of the economic arguments offered for overruling *Dr. Miles*, whatever their (questionable) underlying merits, outweighs the competing *stare decisis* considerations. Prominent among those considerations is the long-standing commercial reliance of discount retailers on the per se rule as an important component of retail market regulation.

ARGUMENT

The Court Should Not Overrule *Dr. Miles*

We leave to Respondent and the other *amici* (especially the American Antitrust Institute) the important task of briefing the compelling doctrinal, economic, and other policy considerations that warrant continued adherence to *Dr. Miles*' long-standing per se rule against vertical price-fixing. See Brief of American Antitrust Institute ("AAI Br."). Our focus is more limited. We urge the Court to give decisive weight to the doctrine of *stare decisis* in this case and, in particular, to recognize the reliance of discount retailers like Burlington Coat Factory on the per se rule. See *infra* § A. In doing so, we also respond briefly (from the perspective of discount retailers) to Petitioner's main argument as to why vertical price-fixing should be freed from per se condemnation: namely, that it is the only

efficient response to the so-called "free-rider" problem. See *infra* § B.

A. *Stare Decisis* Demands Adherence to *Dr. Miles*

1. *Dr. Miles* has governed the law of vertical price-fixing for nearly a century – indeed, for almost the entire life of the Sherman Act. The Court has never called into question *Dr. Miles*' core holding that an agreement to fix a minimum price in the vertical chain of distribution is per se illegal. The Court has, to the contrary, consistently and repeatedly left *Dr. Miles*' core holding intact, even as the Court has refused to extend it, and twice retreated from its extension, to other contexts. When the Court overruled *United States v. Arnold, Schwin & Co.*, 388 U.S. 365 (1967), in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), and thereby removed non-price vertical restraints from the per se rule, it emphasized that its analysis had no bearing on and did not upset the "firmly" "established" rule governing vertical price-fixing. *Id.* at 52 n.18. A decade later when the Court revisited vertical non-price restraints in *Business Electrics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), the Court again took care to emphasize the different footing on which vertical price restraints stand. See *id.* at 725-26. Important to the Court's refusal in *Sharp* to condemn under the per se rule a vertical agreement between a manufacturer and a dealer to cut a second, price-cutting dealer was the clear absence of a "further agreement on the price" to be charged by the surviving dealer. *Id.* at 726. *State Oil Co. v. Khan*, 522 U.S. 3 (1997), the Court's most recent pronouncement on the subject, is in accord. In holding that the per se rule does not condemn vertical *maximum* price maintenance agreements, the Court again made clear that

"arrangements to fix minimum prices . . . remain illegal *per se*." *Id.* at 17. The Court rejected only its earlier extension of the per se rule to maximum resale price maintenance agreements in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). See *Khan*, 522 U.S. at 15-19. See also *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 n.7 (1984) (declining the Department of Justice's invitation to overrule *Dr. Miles*). See generally AAI Br. § I(A) (citing other cases).

Congress, for its part, has stood firmly behind *Dr. Miles*' per se rule during the last few decades as it has no other principle of antitrust law. In the 1970's, Congress revoked the authority it had earlier conferred on the states to exempt certain price-fixing agreements (unlawful under *Dr. Miles*) from coverage under the Sherman Act; in the 1980's, it twice denied the Department of Justice funds to advocate (as the Department was then intent on doing) for the overruling of *Dr. Miles*; and in the 1990's, both the House and Senate passed bills codifying the per se treatment of vertical price-fixing adopted in *Dr. Miles*. See Respondent's Certiorari-Stage Brief in Opposition ("Resp. Cert.-Stage Br.") at 12-13; Brief for Petitioner ("Pet. Br.") at 33-36; Brief for United States ("SG Br.") at 21-22. Petitioner responds by noting that Congress has never actually *required* the Court's adherence to the per se rule. See Pet. Br. at 33-35. Accord SG Br. at 21. That is true, but irrelevant. The question is not whether Congress has mandated the per se rule, but whether it has expressed its position as to how the Sherman Act should be interpreted on the particular issue of vertical price-fixing. The answer is that it has – repeatedly, unmistakably, and authoritatively. See AAI Br. § I(A). See also Herbert Hovenkamp, *Chicago and Its Alternatives*, 1986 Duke L.J. 1014, 1020 n.34 ("I am persuaded . . . that Congress sanctioned the per

se rule for resale price maintenance, and that we should feel obliged to comply with it until Congress tells us otherwise.").

2. We emphasize Congress' actions not merely because they reflect Congress' clear intent on an important question of statutory interpretation to which the Court should give *dispositive weight*, see AAI Br. § II(B), but also because they, together with the above-cited decisions, form an essential part of the regulatory background against which Burlington Coat Factory and many other discount retailers have financed, structured, and operated their businesses. The reliance of discount retailers on *Dr. Miles* needs no elaborate demonstration. Even critics of *Dr. Miles* have noted that, among business interests, discount retailers stand the most to lose from the introduction of price-fixing into the vertical chain of product distribution. See, *e.g.*, Robert H. Bork, *The Antitrust Paradox* 436 (rev. ed. 1993). Petitioner fails to acknowledge the settled commercial expectations of discount retailers – not to mention those who invest in them, contract with them, and patronize them – in asking the Court to overrule *Dr. Miles*. We urge the Court to give these obvious reliance interests the weight to which they are entitled under the Court's well-established *stare decisis* case law. See, *e.g.*, *Hubbard v. United States*, 514 U.S. 695, 713 (1995).

3. Neither Petitioner nor the Solicitor General ultimately reckons with the claim that *stare decisis* has on the resolution of this case. Petitioner, for its part, has relegated its discussion of *stare decisis* to two paragraphs at the very end of its brief. See Pet. Br. at 32. The Solicitor General is only a little more solicitous of the doctrine in

his brief. See SG Br. at 24. A settled and Congressionally sanctioned policy that has regulated retail pricing policy for nearly a century deserves much more respect than either Petitioner on the Solicitor General accords it. See AAI Br. at I(A).

Petitioner and the Solicitor General justify their dismissive stance toward *stare decisis* by claiming that the doctrine applies with somewhat diminished force in the antitrust context because Congress has delegated to the courts the responsibility for developing antitrust policy and adopting antitrust law to changed circumstances. See Pet. Br. at 32; SG Br. at 24-25. That argument, whether or not persuasive as a general matter, is not at all persuasive in the particular context of vertical price-fixing. Congress has actively legislated in this area as it has in few, if any, other areas of antitrust policy – first in the 1930's and 1950's when it authorized states to exempt certain price-fixing agreements (unlawful under *Dr. Miles*) from coverage under the Sherman Act, then in the 1970's when it revoked that authorization, then in the 1980's when it specifically denied the Department of Justice funds to advocate the overruling of *Dr. Miles*, and most recently in the 1990's when it endorsed the per se rule in several bills. See Resp. Cert.-Stage Br. at 11-14. See also AAI Br. § II(A). A 1991 House of Representatives' report noted that, "[w]ith the possible exception of merger policy, *there is no area of antitrust where Congress has displayed such an explicit and abiding intent to set policy for the courts* and enforcement agencies as the area of resale price maintenance." H.R. Rep. 102-237, 102nd Cong., 1st Sess. 4 (1991) (emphasis added).

In any event, Petitioner and the Solicitor General greatly exaggerate the diminished force that *stare decisis*

has in antitrust cases. See AAI Br. § I(B). This Court has taken far more seriously the role of *stare decisis* in antitrust cases than Petitioner and the Solicitor General would have the Court believe. See *id.* It has recognized, in particular, what is of principal concern to Burlington Coat Factory in this case: that antitrust law implicates important reliance interests involving contractual relationships and property rights that should not be cast aside without compelling justification. See, *e.g.*, *Khan*, 522 U.S. at 20.

4. The two vertical distribution cases Petitioner cites in which the Court did overrule precedent – *Schwin* (overruled in *GTE Sylvania*), which established a per se rule for non-price vertical restraints and *Albrecht* (overruled in *Khan*), which established a per se rule for maximum price-fixing agreements – stood on different footing than *Dr. Miles*. Both, when overruled, were recent decisions. *Schwin* was not decided until 1967 – just four years after the "Court had refused to endorse a per se rule for vertical restrictions," *GTE Sylvania*, 433 U.S. at 47, in *White Motor Corp. v. United States*, 372 U.S. 253 (1963) – and *Albrecht* not until 1968. *Dr. Miles*, it bears emphasis, is nearly a century old.

Dr. Miles is distinguishable from *Schwin* and *Albrecht* in still more important ways. *Schwin* created confusion and uncertainty among lower courts as to which (non-price) vertical restraints were lawful and which unlawful. See *GTE Sylvania*, 433 U.S. at 47-48. It was precisely the "need for clarification of the law" governing non-price vertical restraints that the Court cited in *GTE Sylvania* as its justification for reconsidering *Schwin*. See *id.* at 47. *Albrecht* had "little or no relevance to ongoing enforcement

of the Sherman Act." *Khan*, 522 U.S. at 18. *Dr. Miles* cannot plausibly be subjected to either criticism. It provides a clear rule addressing an abiding concern of antitrust law. See Certiorari-Stage Reply Brief for Petitioner at 7-8; AAI Br. § II(A).

5. That rule, it is important to emphasize, creates no doctrinal tension with the contemporary body of case law governing non-price vertical restraints – even assuming, contrary to much of the economic literature, see AAI Br. § II(C), that economic considerations do not justify treating vertical price and non-price restraints differently. We make this point because one of the Court's main concerns in addressing (non-price) agreements restricting vertical distribution has been to ensure that *GTE Sylvania*, which freed such agreements from per se condemnation, "is not frustrated by related legal rules." *Sharp*, 485 U.S. at 726. The ongoing application of the per se rule against vertical price-fixing in no way frustrates the types of non-price vertical distribution agreements that *GTE Sylvania* allows.

B. Overruling *Dr. Miles* Is Not Necessary to Allow Manufacturers to Address the Supposed "Free-Rider" Problem

1. None of the distributive efficiency rationales advanced by Petitioner in defense of vertical price-fixing – whatever their underlying merits – is so compelling as to justify overturning the long-standing per se rule governing vertical price-fixing. Even the economists who have joined Petitioner's cause as *amici curiae* do not consider abolition of the per se rule to be any sort of economic imperative. They themselves acknowledge the "disagreement" in the economic literature as to the "relative

frequency with which pro-competitive . . . effects" are likely to follow the institution of vertical price maintenance agreements. Brief of *Amici Curiae* Economists ("Econ. Br.") at 16. Cf. Robert H. Bork, *Memorandum to the Antitrust Modernization Commission* (2002), at 1, *available at* www.amc.gov/comments/bork (commenting that because the "antitrust laws are performing well, in fact better than at any time in the past seventy-five years, . . . there is very little need for 'modernization' "). All that these economists ultimately agree upon is that the economic literature does not support the proposition that vertical price-fixing is "most often" or "invariably" anticompetitive. *Id.* But again, contrary to the suggestion of Petitioner and the Solicitor General, the issue here is not whether the Court should extend per se treatment to vertical price-fixing but whether it should now withdraw it.

2. The main argument Petitioner advances in support of vertical price-fixing is that it allows a manufacturer "to ensure that dealers provide demand-creating services" by guaranteeing a sufficient profit margin. See Pet. Br. at 19. See also SG Br. at 10-12. "In the absence of resale price restraints," Petitioner claims, "free-rider problems may diminish retailers' incentives to provide these services." *Id.* at 19-20. See also SG Br. at 12-14.

Petitioner's argument begs the initial question whether, in practice, vertical price-fixing is even likely to induce a retailer to provide the sort of demand-creating services that a manufacturer may desire (even if the retailer is not competing with potential free-riders). Petitioner simply assumes, but does not demonstrate, that it likely will. This assumption rests on questionable grounds. See AAI Br. § II(B). Manufacturers that really want to

induce (rather than require) retailers to provide the sort of demand-creating retail "services" at issue in this case – *e.g.*, maintaining "attractive" merchandise displays, Pet. Br. at 3 – are likely to offer retailers lower prices (or other direct economic inducements) in exchange for a contractual commitment to provide the desired services. See AAI Br. § II(B)(3). (The practice is so common that it has long been regulated by federal law. See 15 U.S.C. § 13(d).)

In any event, Petitioner does not offer any empirical evidence that free-riding actually occurs with sufficient frequency to warrant Petitioner's concern. The economic literature is skeptical of claims of widespread free-riding. See, *e.g.*, Brief for William S. Comanor & Frederick M. Scherer at 6. Cf. SG Br. at 13 (emphasizing free-rider problem, but declining to take a position on whether free-riding is "extensive"). Many products are not even sold under conditions that allow for free-riding. See Phillip E. Areeda & Herbert Hovenkamp, 8 *Antitrust Law* ¶1601e, at 13 (2d ed. 2004). See also AAI Br. § II(B)(1).

As for manufacturers legitimately concerned about free-riding, this Court's decisions allow them to address the problem directly without running afoul of the antitrust laws – by contractually requiring that retailers provide whatever demand-creating services they wish, by offering direct economic incentives to provide the services (as discussed above), or by establishing market division arrangements of the sort that *GTE Sylvania* allows. *Dr. Miles* prohibits only price-fixing, and even then only when it takes the form of an actual agreement to fix prices: *United States v. Colgate & Co.*, 250 U.S. 300 (1919), which remains good law, allows a manufacturer to announce a "suggested manufacturer's retail price" and then terminate retailers that refuse to abide by it.

Petitioner acknowledges the various non-price-fixing options available to address the free-rider problem, but declares them less efficient than price-fixing. See Pet. Br. at 20. Here again even the economists supporting Petitioner are much less confident than Petitioner about the economic superiority of vertical price-fixing as a response to the free-rider problem. They note that only "in *some circumstances*" does retail price maintenance have the "*potential* . . . to ameliorate a free riding problem." Econ. Br. at 9 (emphasis added). Even when "alternative methods of curtailing free riding" may be less efficient, the economists supporting Petitioner concede, the efficiency gains of employing retail price maintenance "may not offer an incremental benefit to interbrand competition that would offset the diminution of intrabrand competition." *Id.* See generally AAI Br. § II(B)(3).

CONCLUSION

For the foregoing reasons, the Court should decline to overrule *Dr. Miles* and affirm the judgment of the Court of Appeals.

Respectfully submitted,

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